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A LITIGATOR'S VIEW OF DISCOVERY AND PROOF IN POLICE MISCONDUCT POLICY AND PRACTICE CASES

*G. Flint Taylor**

Since the Supreme Court decided *Monroe v. Pape*[1] in 1961, police misconduct litigators have sought to hold municipalities liable for constitutional violations committed by their employees under color of law. The major reason to establish municipal liability was elementary—to reach a deep pocket in circumstances where the municipality did not willingly indemnify its police employees. The *Monroe* Court rejected vicarious municipal liability under § 1983,[2] but in *Monell v. Department of Social Services of New York*,[3] the Court established direct municipal liability but only where a policy, practice, or custom caused the constitutional violation at issue.[4] *Monell* and subsequent Supreme Court cases established that this policy, practice, or custom could either be written, de facto, or established by the single act of a municipal official if that official was, as a matter of state law, the final policymaker for the act in question.[5] Otherwise, a single unconstitutional act, no matter how egregious, will not, standing alone, establish a sufficient policy, practice, or custom for purposes of municipal liability under § 1983.[6]

While early Supreme Court decisions construing *Monell* articulated only two required elements for establishing *Monell* liability (i.e., a mu-

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1. 365 U.S. 167 (1961).

2. 42 U.S.C. § 1983 (1994).

3. 436 U.S. 658 (1978).

4. *Id.*

5. *Id.* at 690-91, 694; *see* McMillian v. Monroe County, 520 U.S. 781, 784-86 (1997); Praprotnik v. City of St. Louis, 485 U.S. 112, 122-25 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469, 481-84 (1986).

6. City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985).

nicipal policy, practice, or custom, which caused the constitutional violation),[7] the Court later added a third element—deliberate indifference of the municipality and its relevant policymakers—at least in circumstances where the policy or practice was a facially constitutional policy of acquiescence.[8] This deliberate indifference is objective in nature and requires that the relevant policymakers have constructive notice, in contrast to the higher and subjective deliberate indifference standard which the Court has required in Eighth Amendment prison cases.[9] Additionally, the Court has rejected the "heightened pleading" standard previously required by many courts in *Monell* cases and instead requires only notice pleadings under Rule 8 of the Federal Rules of Civil Procedure,[10] adopting the Ninth Circuit's view that the plaintiff need only make "a bare allegation that the individual officer's conduct conformed to official policy, custom or practice" in order to make out a well-pleaded *Monell* claim.[11] The Court has also held that a municipality may not assert a qualified immunity defense[12] and that the municipality cannot be held liable for punitive damages.[13]

WHY BRING *MONELL* CLAIMS IN POLICE CASES?

In addition to reaching the municipal deep pocket, there are additional reasons to bring a *Monell* claim in a § 1983 police case. A *Monell* claim gives plaintiffs' lawyers in serious brutality cases a direct path to the municipality, which is often important for purposes of discovery, settlement, trial, and collection. In cases where the accused official has committed a constitutional violation but is immune from suit, a *Monell* claim against the municipality may be the only actionable claim. Such claims also facilitate the development of systemic evidence of deliberate indifference to police brutality, as well as information concerning "repeater" officers, the functioning of the police disciplinary and counseling system, and the attitudes of police offi-

7. *See* Owen v. City of Independence, 445 U.S. 622 (1980).

8. City of Canton v. Harris, 489 U.S. 378 (1989).

9. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 840-41 (1994).

10. FED. R. CIV. P. 8.

11. Leatherman v. Tarrant County Narcotics, Intelligence, and Coordination Unit, 507 U.S. 163, 168 (1993).

12. *Owen*, 445 U.S. at 622.

13. City of Newport v. Fact Concerts Inc., 453 U.S. 247 (1981). For an in depth discussion of Supreme Court and lower court decisions on the issue of municipal liability, see Karen M. Blum, *From* Monroe *to* Monell*: Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMP. L.Q. 409 (1978); G. Flint Taylor, *Municipal Liability Litigation in Police Misconduct Cases From* Monroe *to* Praprotnik *and Beyond*, 19 CUMB. L. REV. 447 (1988); and MICHAEL AVERY ET AL., POLICE MISCONDUCT LAW AND LITIGATION §§ 3:4-3:5 (1996).

cials towards important police disciplinary issues. If appropriate protective orders are obtained, this information can be shared by lawyers in their various cases against police abusers, obviating the need for extensive discovery in each case, and helping each lawyer to properly evaluate his or her case for settlement and trial. A *Monell* claim also permits wider discovery, broadens the scope of admissibility at trial, facilitates holding supervisory and command officials responsible, and allows plaintiffs' litigators to properly apportion the blame between the individual officers and the municipality. In some instances, aggressive discovery and litigation of such claims can also positively affect pertinent police policies and practices, as well as increase the value of the case for settlement or at trial.

Conversely, however, *Monell* claims can greatly increase the costs of litigation, the attorney time expended, the effort of the opposition, and the length and complexity of the trial. Defense tactics, such as seeking bifurcation of the *Monell* claims from the underlying cause of action, contesting discovery, and otherwise delaying resolution of the case, can also be frustrating and render *Monell* claims counterproductive. Moreover, many trial judges tend to look on such claims with disfavor, and deliberate indifference and other related issues can present formidable legal obstacles.

In sum, *Monell* claims, while an important litigational tool, should only be utilized after careful consideration of all the pertinent factors relevant to the particular case in question, including: (1) the seriousness and complexity of the underlying claim; (2) the underlying questions of immunity; (3) the public importance of the issues raised; (4) the disciplinary background of the accused officers; (5) the applicable indemnification statutes and policies; (6) whether the municipality has conceded that the officer was acting in the scope of his employment; (7) the attitudes of the trial judge to whom the case is assigned; (8) the resources available to pursue the claim; (9) the nature of the policy and practice; and (10) the strength of the claim—both with regard to the policy and practice itself, and its causal relationship to the underlying misconduct.

COMMON TYPES OF *MONELL* CLAIMS IN POLICE MISCONDUCT CASES

There are several different types of policy and practice claims which typically arise in § 1983 police misconduct cases. First, there are claims which are premised on an affirmative pattern of misconduct and/or municipal deliberate indifference to it. Examples include a pattern of police torture of suspects in custody, planting of evidence,

or domestic violence by police officers.[14] A second type of claim arises when the underlying misconduct arises directly from the practice itself, such as when a claim of malicious prosecution and suppression of exculpatory evidence arises from a police practice of maintaining secret "street files" in order to suppress exculpatory information from criminal defendants.[15] A third type of claim arises when the municipality's final decisionmaker is a participant in the underlying misconduct itself.[16] Finally, there is the *Monell* claim that arises from the municipality's systemic failure to adequately hire, train, supervise, discipline, monitor, counsel, or otherwise control its officers.[17] Since these "failure to" claims are the most commonly employed *Monell* claims in police misconduct cases and since failure to discipline is so often the linchpin of such claims, we will examine in detail discovery and proof in failure to discipline cases.

DISCOVERY AND PROOF IN *MONELL* FAILURE TO DISCIPLINE CASES

Two recent Supreme Court decisions, *City of Canton v. Harris*[18] and *Board of County Commissioners of Bryan County v. Brown*,[19] have the most direct application to *Monell* failure to discipline cases. In *Canton*, the plaintiff alleged a failure to properly train police officers, and the Court held that such a facially unconstitutional policy could be sustained only if the failure "amounts to deliberate indifference to the rights of persons with whom the police come in contact" and evidences "a 'deliberate choice to follow a course of action . . . from various alternatives' by City policy makers."[20] The "need for more or different training must be so obvious and the inadequacy so likely to result in the violation of constitutional rights that the policy makers of the City can reasonably be said to have been deliberately indifferent to the need."[21] Moreover, the Court held that the "alleged deficiency in the training program must be closely related to the ultimate injury," and posited a test in aid of that determination:

> Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect?

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14. *See, e.g.*, Wilson v. City of Chicago, 6 F.3d 1233 (7th Cir. 1993); Czajkowski v. City of Chicago, 810 F. Supp. 1428 (N.D. Ill. 1992).

15. *See, e.g.*, Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988).

16. *See, e.g.*, Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).

17. *See, e.g.*, Sledd v. Lindsay, 102 F.3d 282 (7th Cir. 1996); McLin v. City of Chicago, 742 F. Supp. 994 (N.D. Ill. 1990); Means v. City of Chicago, 535 F. Supp. 455 (N.D. Ill. 1982).

18. 489 U.S. 378 (1988).

19. 520 U.S. 397 (1997).

20. *Harris*, 489 U.S. at 388-89.

21. *Id.* at 390.

> Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the factfinder, particularly since matters of judgment may be involved, and since officers who are well-trained are not free from error and perhaps might react very much like the enthroned officer in similar circumstances. But the judge and jury, doing their respective jobs, will be adequate to the task.[22]

In *Board of County Commissioners of Bryan County v. Brown*, the plaintiff obtained a *Monell* verdict against Bryan County on her excessive force claim. This verdict was premised on the Sheriff's prior decision to hire the officer who committed the excessive force, despite a questionable history which included a misdemeanor conviction for assault.[23] The Supreme Court, "without deciding whether proof of a single instance of inadequate screening could ever trigger municipal liability," and applying "rigorous standards of culpability and causation" to determine whether the plaintiff had shown the requisite deliberate indifference as set forth in *Canton*, reversed the verdict, holding that the County was "not liable for Sheriff Moore's isolated decision to hire [Officer] Burns without adequate screening, because respondent has not demonstrated that his decision reflected a conscious disregard for a high risk that Burns would use excessive force in violation of respondent's federally protected right."[24]

The *Canton* and *Brown* decisions have obvious relevance to the closely related *Monell* failure to discipline claims, which also continue to be viable under these restrictive holdings. Deliberate indifference is also the appropriate standard in discipline cases, with a similar standard of causation required. Moreover, it seems apparent that the disciplinary inadequacies need be equally obvious and the harm equally likely to result as in training cases for there to be deliberate indifference by the municipality's policymakers. With these decisions in mind, we now turn to the specifics of pleading, discovering, and proving a *Monell* failure to discipline case.

In keeping with the rationale of these decisions, the major goal of plaintiffs' lawyers in proving a failure to discipline case is to show that the police disciplinary process, both formal and informal, is woefully inadequate, with the result being that the department fails to discipline officers, as a matter of policy and practice, in the great majority of meritorious police abuse cases that are brought to its attention. After this is shown, it is appropriate to argue, under *Canton*, that this general failure to discipline was a direct cause of the brutality that is

22. *Id.* at 391.
23. *Brown*, 520 U.S. at 401.
24. *Id.* at 415-16.

the subject of the particular case at bar because the police violator was aware that he was effectively immunized from disciplinary action by this disciplinary policy, making the eventuality of the unconstitutional violation sufficiently obvious to the municipality to sustain liability under *Canton* and *Brown*. The policy and practice of failure to discipline operates hand in hand with the police "code of silence," a closely related practice and custom that is manifest in all police departments. This code of silence further aids the offending officer in escaping disciplinary reproach. Additionally, another important, although not indispensable, element of the causation equation is the existence of prior complaints of brutality and misconduct against the defendant violator. "Not sustained" findings in these cases further establish the police defendant's expectation of immunity from punishment when he brutalizes the plaintiff, and demonstrate some degree of prior notice to the municipality. "Sustained" findings—a much more unlikely circumstance—operate as stronger evidence of notice and may also be admissible against the defendant police officer under Rules 404(b) or 608(b) of the Federal Rules of Evidence.[25]

The specifics of proof in discipline cases often require a painstaking gathering and analysis of much detailed evidence concerning the disciplinary process over a period of several years before and after the incident in question. Fortunately, in many jurisdictions much of this work has already been done in prior cases, so counsel must only locate and update already developed evidence. Often, a police expert, either a sympathetic local (ex) police official, or one who specializes in police misconduct cases, may be required to help interpret and evaluate the evidence, both for plaintiff's counsel, and, later, for the jury.

Much of this evidence can be found in the official files, reports, and minutes kept by the police disciplinary agency, the police board, or the office of the police superintendent; in audits or other periodic reviews done by the department or outside agencies; in police general orders and regulations; in the local ordinances that often create and regulate the disciplinary agencies; and in the records of public hearings held to investigate the disciplinary system after particularly egregious acts of unpunished brutality cause widespread community outrage. Additionally, under pressure due to community outrage, high level police personnel sometimes make relevant admissions to the media or at public hearings. The Special Litigation Unit of the Department of Justice has recently implemented consent decrees against police departments in Pittsburgh, Pennsylvania and Steuben-

25. FED. R. EVID. 404(b), 608(b).

ville, Ohio which establish meaningful reforms of the police disciplinary systems, as well as the related areas of police monitoring, training, supervision, and record keeping, which can serve as important tools in setting standards of competence and identifying specific systemic problems.[26] Additionally, numerous agencies and foundations, including the Police Foundation, the International Association for Civilian Oversight of Law Enforcement, the Police Practices Project of the San Francisco ACLU, the National Lawyers Guild, the Lawyers' Committee for Civil Rights Under Law, the Medgar Evers Center for Social Justice, the International Association of the Chiefs of Police, and private law firms are also sources of valuable information. Recent studies and reports on police abuse by human rights organizations, such as Amnesty International and Human Rights Watch, are also valuable resources.[27]

After this evidence is gathered and analyzed, depositions of the police superintendent, the director of the police disciplinary agency, a sympathetic police official or police board member, the investigator who was assigned to your client's case, the head of the department's "early warning" and counseling program, and the police violators and their supervisors, should yield further relevant evidence—a combination of admissions, contradictions, unlikely ignorance, and implausible denials.

THE DISCIPLINARY AGENCY

The composition, procedures, and performance of the police disciplinary agency are vital components of the proof itself. First, statistics concerning the number of citizens' complaints must be received and processed, and the imposition of police discipline must be obtained and evaluated. Most police disciplinary agencies have several recommended findings that include the categories of "sustained" and "not sustained." While the "sustained" category normally carries with it a recommendation for some form of discipline, the ubiquitous "not sustained" category is most often defined as "not enough evidence to either prove or disprove the charges" and results in no discipline to the officer. Most urban police disciplinary agencies "sustain" a very

26. *See, e.g.*, Consent Decree of Apr. 16, 1997, United States v. City of Pittsburgh (No. 97-0354) (on file with *DePaul Law Review*).

27. *See, e.g.*, AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA, POLICE BRUTALITY AND EXCESSIVE FORCE IN THE NEW YORK CITY POLICE DEPARTMENT (1996); HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES (1998).

small percentage of the citizens' complaints that they investigate, while their "not sustained" rates are often fifty to sixty-five percent.

There are several ways to present this proof in order to substantiate the failure to discipline claim. The "sustained" rate can be compared to success rates in the adjudication of similar claims in other forums (for example, § 1983 police brutality cases, criminal prosecutions in felony cases, internal police adjudication of non-civilian complaints of police misconduct, and "sustained" rates in other jurisdictions) to show how disproportionately low the disciplinary "sustained" rate is. Selected cases of clear merit where the officer was absolved by the disciplinary process can be presented, with emphasis on those in which the officer was subsequently convicted of criminal misconduct, found liable in a civil trial, or subjected to a substantial civil settlement. The fact that disciplinary proceedings against the officer were not reopened and discipline imposed even after such an unfavorable resolution should also be shown.

Additionally, by the department's own definition, the "not sustained" rate is in reality a non-finding, and the Justice Department has recognized this problem in its consent decrees by reclassifying all such cases as "not resolved." The disciplinary agency, the superintendent, or an investigator will often admit that "one on one" cases (i.e., victim vs. the police officer with no independent witnesses) are most always classified as "not sustained." The clearly meritorious cases that go into this category, together with the admissions of the defendants, and the sheer volume of "not sustained" findings, provide additional evidence in support of a plaintiff's failure to discipline claim. The testimony of a police expert is often extremely important in addressing this question, as the expert can examine a large sample of "not sustained" investigations which might not be otherwise admissible, and not only offer opinions about the inadequacy of those investigations, but also form an opinion as to how many of those cases should have been sustained pursuant to Rule 703 of the Federal Rules of Evidence.[28]

So, even if the "sustained" rate is relatively respectable, there may still be a viable disciplinary claim, if the "not sustained" rate is disproportionately high. Another circumstance where a relatively high "sustained" rate may not preclude a disciplinary claim is where the complaints received and processed by the department or the agency are disproportionately low in comparison to the size of the municipality and the department and do not reflect the known level of brutality

28. FED. R. EVID. 703.

in the community. While the department would no doubt argue that this is due to the low level of brutality, a more plausible explanation, in light of the known level of brutality, would be that the public has little or no confidence in the agency for various reasons, such as it is run and staffed by police rather than civilians, it often loses complaints or refuses to log or investigate them. In such circumstances, the "sustained" statistics can be overcome by proof of the structure, operation, and public image of the disciplinary agency in question.

Often, the "sustained" rates released by the department, when further analyzed and broken down, prove to be inflated. In many cases, there are multiple allegations that include a charge of excessive force together with various lesser charges, while on other occasions, there is no excessive force alleged at all. Further examination and breakdown of the "sustained" complaints in this way may establish that non-excessive force allegations are "sustained" with greater relative frequency than excessive force allegations. Additionally, cases that are sustained by the disciplinary agency are reviewed at various levels, and the finding is sometimes changed by the police superintendent or the police board. The "sustained" rates should also be examined to determine if Black victims or Black officers are treated less favorably than white ones, as should the actual punishment meted out in those "sustained" cases that withstand review. Often, the punishment is disproportionately minor for the offense—an admonishment, a reprimand, an "instruction," or a short suspension. The degree of punishment can also be compared with that which is meted out in cases where the allegation is not based on abuse of a citizen (e.g., insubordination), as the punishment in these less serious cases will often be greater than in a serious brutality case.

PROCEDURAL AND FUNCTIONAL INADEQUACIES OF THE DISCIPLINARY SYSTEM

Another major area of proof in *Monell* failure to discipline cases is the procedural and functional inadequacies of the disciplinary system itself.[29] A very important component of this proof is the connection of the disciplinary agency to the police department. While civilian review boards and civilian investigative staffs have not proven to be the panacea that they were once thought to be, this is largely because they are, in most instances, ultimately controlled by the police department, inadequately staffed and funded, and constrained from aggressively investigating and disciplining police who violate citizens' rights.

29. Monell v. Department of Soc. Servs., 436 U.S. 658, 690-91 (1978).

Where citizens' complaints are investigated by the department's Internal Affairs Division and its staff of police officers, police connection and control is easily shown. However, where there is the appearance of civilian review, the proof is more extensive and sophisticated. Although the director may be a civilian, chosen by the mayor, the agency may have been created by police order, and that order may classify the director as a member of the police superintendent's staff or place him in the police chain of command. The agency's "sustained" findings and disciplinary sanctions are most likely mere recommendations that are subject to review and change by police command personnel, the superintendent, and the police board. The department may have the power to remove selected complaints from the agency's jurisdiction altogether and deal with them internally, either by the Internal Affairs Division, which is staffed by police officers, or by police supervisors at the stationhouse level without external review. Many of the investigators, while not currently police officers, may be former city or police employees, police candidates awaiting results of the police examination, persons who were sponsored by police or city officials, or persons who are otherwise connected to law enforcement. Additionally, police may comprise part of the investigatory or supervisory staff and complaints may be taken at police headquarters or a police station. While the city may have a civilian review board, it often has little or no power to effect police discipline, as it may only receive the "sustained" cases that have survived the investigatory and police review stages.

The procedures and standards followed by the agency, the efficiency and competence of the investigators, and investigations may also be important components of the proof. The salaries paid may not be sufficiently competitive to attract competent investigators and the staff may not be properly educated, motivated, trained, or otherwise qualified for the job, in addition to being predominately male and white. The agency may be understaffed for the volume of work at hand, and the resultant backloads may be a cause of shoddy, pro forma investigations. The agency may not have subpoena power, and an examination of the statements taken may show a hostile or skeptical cross-examination approach by investigators when questioning victims, and a deferential, "once over lightly" approach when questioning police perpetrators and accomplices. Sometimes, the accused officer is not required to give a formal statement at all, but rather responds with a brief report which contains little more than a bare denial. Basic items of evidence such as police reports, lock-up records, medical records, photographs, or police tapes may not be obtained or are subsequently

"lost," and efforts to identify an officer unknown to the victim may be cursory or non-existent.

Some agencies refuse to take anonymous complaints, to enter findings where the perpetrator is unknown, to continue an investigation if the complainant refuses to cooperate, or to investigate a pattern or practice by a certain officer or officers within a stationhouse. At least one department officially warns potential complainants and witnesses that they will be prosecuted for filing a false report if its investigation determines that the complaint was false, malicious, or filed in bad faith. Investigators are often not permitted to know about any past disciplinary history of the officers when investigating allegations against them or to take the history into account when making their determinations, even though "repeater beaters" with a particular modus operandi are an admitted problem in most departments and many police officials will admit that such information would be significant in determining the credibility of the complaint. Record-keeping is often shoddy and archaic, with no cross-referencing of serious allegations such as torture, abuse of women, or beatings with a flashlight, so patterns cannot be identified and investigated. The backlog is often large, complaints are lost, or victims and witnesses never contacted or recontacted, and some cases remain open for years being buried in the "not sustained" category. While the agency may profess to employ a preponderance of the evidence standard, the investigators are often unable to articulate or demonstrate any comprehension of the meaning of the term. Furthermore, their recommendations in specific cases, as well as the general "sustained" rates, demonstrate that, in reality, many investigators follow a "reasonable doubt" standard. A comparison of the investigative procedures within the department's detective division with that of the disciplinary agency should also demonstrate the manifest inadequacies in the latter's investigatory techniques and performance.

THE POLICE CODE OF SILENCE

Another closely related area of importance is the police code of silence. While the code can also be pleaded and proven as a separate policy and practice, its relevance to a failure to discipline claim is also significant. The code of silence is normally a department-wide practice that dictates that officers refuse to bear witness against a fellow officer who is alleged to have violated a citizen's rights or otherwise

engaged in misconduct.[30] An officer may implement the code by failing to report misconduct by a fellow officer, by falsely confirming the charged officer's version of the events, by refusing to name other officers involved in the incident, or by claiming that their line of vision was conveniently blocked, that they were otherwise occupied when the incident happened, or that their memory has lapsed concerning the incident. While police officers may feel that a fellow officer has acted wrongfully, they fear that they will lose their job, or be subject to ridicule, ostracization, and physical reprisals from their comrades if the truth is told. When the perpetrator is white, and the fellow officer is Black, the code is sometimes more reluctantly and less actively honored. A related aspect of the code is police perjury in cases where the victim is charged with an offense in order to cover-up police abuse and misconduct, a practice which has been dubbed in several jurisdictions as testifying by the offending officers themselves.

Obviously, the code of silence is a major hindrance to police disciplinary investigations, and some investigators and agency supervisors will admit that the code exists and that it hampers their effectiveness. These admissions are helpful, but feigned ignorance or denials by these officials can be even more advantageous, if the code can be independently shown, because it underscores the agency's pro-police bias and its complete failure to properly evaluate and adjudicate complaints. Instead of educating and training investigators about the code and expressly requiring its consideration when the statements of police witnesses are evaluated, most agencies ignore the code or deny its existence and, as matter of practice, rule in favor of the police officer in cases where it is a credibility contest between police and the victim.

The code itself can be shown in several ways. The director of the agency, the police superintendent, or a police or agency supervisor may concede its existence. A police audit or civilian review board report may marshal statistics that show that officers hardly ever initiate complaints or testify against fellow officers and conclude that this is due to the code of silence. Examination of the officers in the case may establish that they have never testified against another officer nor are they aware of any other officer who has. This is especially effective where the officers so examined are detectives who have testified at numerous motions to suppress where brutality or other unconstitutional conduct has been alleged. In the unusual circumstance where

30. *See generally* Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Apporach in Police Perjury*, 59 U. PITT. L. REV. 233 (1998) (discussing police codes of silence); G. Flint Taylor, *Abusive Conduct and Torture Tactics of Police*, 3 POLICE MISCONDUCT & CIV. RTS. L. REP. 7 (1990) (same).

an officer has come forward, subsequent treatment, both by fellow officers and the command structure, is often further proof of the code because he or she will frequently be disciplined, transferred, or otherwise harassed and ridiculed.

Often, there are regulations that require officers to officially inform their supervisor or receive the supervisor's approval if they testify for a criminal defendant or a civil rights plaintiff; conversely, no such requirement exists when testifying for the prosecution or in defense of fellow officers at a civil rights trial. Sometimes, a court or jury will have recognized the existence of the code within the department.[31] Proof of the code is not only relevant to the policy allegations but also gives the plaintiff a context in which to place and forcefully argue the lies and cover-up that underpin the police officer's defense in the case at bar.

PRIOR POLICE MISCONDUCT

The defendant police officer's background can often be an important aspect of the proof. If there were prior recorded instances of brutality or misconduct and complaints were filed by the victims, the complaint and the records of any investigations generated by those cases should be obtained (if they have not been destroyed), and analyzed for patterns and/or similarities in the weapon used, modus operandi, and explanations offered in defense. Most likely, the vast majority of the prior complaints will have been classified as "not sustained," and some independent investigation of these cases should be done to determine whether it can be shown that one or more of the prior "not sustained" complaints were in fact meritorious. If so, this proof demonstrates notice, is directly relevant to establishing the failure to discipline policy itself, and strengthens the affirmative or causative link between the policy and the officer's conduct in the case at bar. Any prior complaints that have been "sustained" more directly show notice to the municipality of the officer's propensity for misconduct, while the ultimate punishment imposed may be disproportionately lenient as to have the same practical effect as a "not sustained" finding.

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31. *See, e.g.*, Jones v. City of Chicago, 856 F.2d 985, 995 (7th Cir. 1988) (revealing officer's practice of "retaining records in clandestine files deliberately concealed from prosecutors and defense counsel"); Spell v. McDaniel, 824 F.2d 1380, 1393 (4th Cir. 1987) (noting that excessive uses of force were not punished because of an effective "code of silence" within the department); United States v. Ambrose, 740 F.2d 505, 521 (7th Cir. 1984) ("[I]t was admitted here from the witness stand, that there is a code of silence, and that most policeman observe it."); Thomas v. City of New Orleans, 687 F.2d 80, 82 (5th Cir. 1982) (stating that the jury found a "code of silence" existed which violated the plaintiff's rights).

Additionally, your client or others who live in the community may know of other unreported incidents of misconduct by the defendant officers or be aware of the offending defendant's reputation for brutality. The admissibility of such evidence on the discipline claim is problematic because the municipality can argue that it did not receive actual notice. However, the evidence would be relevant if there had been police intimidation of the victim, or to show the lack of community confidence in the disciplinary agency. Also, if the reputation were widespread, constructive notice could also be argued.

"Repeater beaters," and the disciplinary system's response to them, can also be a significant area of proof. All departments have repeaters, supervisors know who they are, and complete and accurate disciplinary records should also identify them.[32] Some of these repeaters are notorious and have cost the municipality large amounts of money in judgments and settlements. The department or its disciplinary agency may keep a repeater file, computerized lists of repeaters, or have some form of early warning and counseling program. In some departments this repeater information may be used to develop a profile of a problem officer to identify those officers with such backgrounds, and to predict future problem officers. The department may also break down the incidence of brutality in a given police district, stationhouse, or under a particular supervisor. Reference to federal court records or inquiry to other lawyers may reveal prior cases. Once the most egregious repeaters are identified, the failure to discipline them, despite their misconduct, can often be shown. Additionally, the procedural and systemic failures in dealing with repeaters—including the destruction of disciplinary records, the failure to psychologically counsel or transfer them after a series of complaints, the failure of supervisors to admit that there is a problem with these officers or to take any corrective measures, the assignment of such repeaters to elite units, such as tactical units, their promotion to supervisory positions, their commendation in incidents where misconduct is alleged, and, in some instances, the failure to even recognize that "repeaters" are a problem at all—are all relevant to the issue of discipline. Again, a police expert's testimony in this area would help to synthesize and simplify the proof and his opinions would affirmatively buttress its impact.

32. G. Flint Taylor, *Proof of Police Failure to Discipline Cases: A Survey*, 3 POLICE MISCONDUCT & CIV. RTS. L. REP. 39 (1990) (discussing repeat offenders in police departments throughout the United States).

MUNICIPAL DEFENSES TO FAILURE TO DISCIPLINE CLAIMS

The municipal defendant may offer various explanations or defenses to plaintiffs' evidence of a failure to discipline. The low "sustained" rate is sometimes explained by asserting that citizens often make meritless complaints to retaliate against officers who have legitimately arrested or detained them or to aid alleged "criminals" in their criminal defenses. While this may be true in a small percentage of cases, the opposite is more often true—people fail to file complaints when they have a meritorious case because they mistrust or are intimidated by the police and disciplinary system. The defense may also assert that organized groups such as street gangs file bogus complaints for retributive purposes, but the reality is that most street gang members are loathe to file complaints, no matter how intense the police harassment they suffer, in order to avoid confrontations with the police so they can continue to transact their business. Moreover, demographic studies have shown that most complainants are not street gang members or alleged "criminals" accused of serious offenses but rather are average, predominantly nonwhite, citizens who have a chance encounter with the offending officers.

The defendants will attempt to explain the high percentage of "not sustained" cases by claiming that witnesses and victims will not cooperate. Again, in some cases, this is true, more often than not because of incompetence and intimidation factors. Often the "non-cooperative" witness or victim was never located or contacted because the investigator was lazy, incompetent, overworked, or was afraid of going into a "high crime" area to find the witness or to conduct the interview. The lack of subpoena power is also an important reason for this failure. Again, in the majority of the cases, non-cooperation is not the reason for the finding; rather, it is the unfair or arbitrary adjudication of a meritorious case to avoid sustaining the allegations and recommending discipline for the offending officer.

Blame-shifting is also a frequently employed tactic. The disciplinary agency often blames insufficient funding and staffing, the lack of subpoena power, victim and police non-cooperation, as well as the superintendent, the mayor, the city council, the police board, and prior administrations. The effectiveness of this approach can be minimized, however, if the disciplinary policy and practice is clearly defined as a joint and continuing effort by all of these actors, rather than just by the disciplinary agency, and that together they are responsible for the shortcomings of the system. However, because the focus of the

claim—and the main source of deliberate indifference—is the agency, this may soften the impact of the proof.[33]

The shifting of the blame to the police union is another tactic utilized by the defense. The union is often responsible for negotiating terms in the police contract that further weaken the disciplinary apparatus—such as the destruction of "not sustained" disciplinary records after five years, limitations on the use of "not sustained" findings for discipline and monitoring even where a pattern is shown, and multi-tiered procedural guarantees to the accused officers after the agency finds that the officer violated departmental rules. In rebuttal, it is important to emphasize that the municipality *agreed* to these terms and is therefore equally responsible for them. Moreover, the possibility of joining the union, as an agent of the police which represents them for their official "color of law" activities, in *Monell* claims for their policies of encouraging police brutality and the code of silence and undermining the effectiveness of the disciplinary system should also be considered.

The municipality may also assert that some cases are later lost at administrative hearings after the disciplinary agency has "sustained" the case. In response, it can often be shown by prior admissions or studies that the municipality's presentation of the cases at hearing was indifferent or incompetent; furthermore, this does not address the vast majority of cases that never progress to the hearing stage because the original finding absolved the officer.

Given recent developments in the law, practitioners may also expect the municipal defendant to make a strong effort to establish a lack of deliberate indifference. The Seventh Circuit has taken the lead in establishing an onerously high deliberate indifference standard—one where any remedial effort, no matter how ineffectual or inadequate, may suffice to defeat the claim.[34] Hence, the defendant will most likely offer cosmetic changes to the disciplinary agency itself, ineffectual early warning systems, pro forma counseling sessions by superior officers, and the like as a defense.

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33. Ironically, at least according to the Seventh Circuit, the appropriate policymakers, as a matter of law, may be the Police Board and the City Council, rather than the Police Superintendent and his command personnel. *See* Wilson v. City of Chicago, 6 F.3d 1233, 1240 (7th Cir. 1993); Auriemma v. Rice, 957 F.2d 397, 401 (7th Cir. 1992). This may necessitate a shift in the focus of the pleading, proof, and argument with regard to notice and deliberate indifference, to accommodate this legal fiction.

34. *See Wilson*, 6 F.3d at 1239-41 (concluding that since the Superintendent of Police properly referred complaints to the investigating body was sufficient because the plaintiff did not establish bad faith).

PROTECTIVE ORDERS

The municipality and the police union will not only aggressively contest production of much of the relevant policy and practice evidence described above but will also seek highly restrictive protective orders. Typically, the municipality pursues orders which completely bar public dissemination of all information obtained from the police department as well as prevent its dissemination and use in similar cases. Sometimes, the municipality seeks further restrictions such as the return of the documents after the case is resolved. Often, the municipality attempts to condition production of the files on the plaintiff's agreement to these restrictions. Especially in instances where the material may be important to other cases or contain information of public importance, such unreasonable restrictions should be resisted. Case law supports the limited dissemination of information to lawyers in other similar cases as well as the public release of police disciplinary information of public importance.[35] Additionally, the order can also specifically except statistical information from its purview and provide a specific procedure for judicially challenging the municipality's designation of specific documents as subject to the secrecy provisions of the protective order.[36]

CZAJKOWSKI V. CITY OF CHICAGO: A CASE STUDY

The case of *Czajkowski v. City of Chicago*[37] further illustrates the strategies and tactics of litigating a *Monell* failure to discipline claim. Chicago police officer Ruben Garza, while on duty and with his partner Milan Hrebanek, drove their squad car to a neighboring district and located his estranged wife, Mary Czajkowski, who was driving through a park with their six-year-old son.[38] Garza put on his Mars light and curbed Czajkowski.[39] After stopping her, and in full view of his partner, he choked her, gouged her chest with the keys he pulled

35. *See, e.g.*, Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787-89 (3d Cir. 1994) (noting that information should be kept confidential to prevent infliction of pain on parties); Wilk v. American Med. Ass'n, 635 F.2d 1295, 1300 (7th Cir. 1980) (stating that "collateral litigants[s] should not be permitted to exploit another's discovery . . . to obtain access to the sealed information"); Wiggins v. Burge, 173 F.R.D. 226 (N.D. Ill. 1997), *appeal dismissed*, 150 F.3d 671 (7th Cir. 1998).

36. A thorough treatment of the question of protective orders can be found in the cases of *Triplett v. Shield*, 97-C-2775 (N.D. Ill. 1997) and *Fallon v. Dillon*, 90-C-6722 (N.D. Ill. 1990) and the orders entered therein by District Judge Milton Shadur. See, for example, the protective order entered on September 17, 1992 in *Fallon*, as well as Judge Shadur's oral order of July 31, 1998 in *Triplett*.

37. 810 F. Supp. 1428 (N.D. Ill. 1992).

38. *Id.* at 1431.

39. *Id.*

out of her ignition, and tried to take custody of the child.[40] His partner did nothing and later denied that Garza had assaulted Czajkowski in any way.[41] At the time of this assault, Garza was subject to a court order of protection which forbade him from having contact with Czajkowski.[42]

Czajkowski went to the closest district station to report Garza's assault and battery.[43] Charges were drawn, a summons rather than an arrest warrant was issued, and an internal disciplinary investigation was initiated by the Office of Professional Standards ("OPS"), the police agency which investigated police excessive force and domestic violence cases.[44] Czajkowski gave a detailed statement to the OPS in which she also recounted repeated prior acts of violence against her by Garza, including one only three weeks before, during which he beat her and threatened her with his service revolver.[45] She also stated that Garza had taunted her about reporting his brutality, stating that all policemen were "brothers" who protect each other and that the department would do nothing to him.[46] The OPS took pictures of the scratches on Czajkowski's chest, but failed to open investigations on the prior incidents.[47] The OPS then delayed taking the officers' statements until after the criminal case had been dismissed. Czajkowski, fearing for her safety and that of her son, subsequently dropped the criminal charges. The OPS then took brief statements from Garza and his partner during which they did not question Garza about the prior incidents or his brazen reference to the code of silence and issued a "not sustained" finding.[48]

Czajkowski later reinstituted the criminal charges against Garza, and he was convicted of battery for scratching her with the keys and was sentenced to supervision.[49] On the basis of his conviction, the OPS reopened its investigation, "sustained" the scratching allegations, and Garza received a thirty day suspension.[50] Czajkowski and her son

40. *Id.*

41. *Id.*

42. *See* Plaintiffs' 12(n) Statement of Additional Facts in Response to Defendants' Motion for Summary Judgment ¶ 195, Czajkowski v. City of Chicago (N.D. Ill. Oct. 1, 1993) (No. 89-C-3201) (on file with *DePaul Law Review*).

43. Plaintiffs' Complaint ¶ 19, Czajkowski v. City of Chicago (N.D. Ill. Oct. 1, 1992) (No. 89-C-3201) (on file with *DePaul Law Review*).

44. *Id.* at ¶¶ 19-23.

45. Plaintiffs' 12(n) Statement ¶¶ 32-33.

46. *Id.* ¶ 159; Plaintiffs' Complaint ¶ 18.

47. Plaintiffs' 12(n) Statement ¶¶ 33-34; Plaintiffs' Complaint ¶ 19.

48. Plaintiffs' 12(n) Statement ¶¶ 38-39, 120.

49. Czajkowski v. City of Chicago, 810 F. Supp. 1428, 1431-32 (N.D. Ill. 1992).

50. *Id.* at 1432-34; Plaintiffs' 12(n) Statement ¶ 46.

subsequently filed a § 1983[51] complaint, alleging that Garza and Hrebanek violated the Fourth Amendment while acting under color of law when Garza used excessive force and Hrebanek failed to prevent Garza from doing so.[52] Czajkowski also alleged that Garza had acted pursuant to related de facto municipal policies, practices, and customs of failing to properly train, discipline, supervise, control, or counsel police officers, particularly those who engaged in domestic violence and of encouraging and permitting a police "code of silence" by which officers protected fellow officers when they were accused of excessive force and domestic violence.[53]

MONELL POLICY AND PRACTICE EVIDENCE

The plaintiffs developed their policy and practice evidence on three levels: (1) failure to adequately respond to and discipline the defendant's acts of domestic violence; (2) failure to adequately respond to domestic violence on the department-wide level; and (3) general failure to adequately respond to, and discipline, the excessive use of force, including domestic violence. Czajkowski's first level of proof established that the police department failed to supervise, discipline, and control Garza despite their knowledge that he was prone to violence against the plaintiff. It included several prior incidents of violence against Czajkowski which, although known to the department, were not investigated and for which Garza was never criminally charged or disciplined, counseled, supervised or otherwise controlled.[54] As early as six years before the incident, Czajkowski summoned the police to her home after Garza menaced her with his pistol, attempted to suffocate her, and threatened to kill her, their six-month-old child, and himself.[55] The responding officer and his sergeant made no report and talked Czajkowski out of pursuing criminal and disciplinary charges by reminding her that Garza might lose his job and, therefore, their source of income.[56] His supervisors were not contacted, and Garza dismissed the incident as inconsequential.[57] On two other occasions, Czajkowski called the personnel sergeant in charge of the department's counseling and monitoring program for problem officers and reported abusive conduct, but the sergeant told

51. 42 U.S.C. § 1983 (1994).
52. *Czajkowski*, 810 F. Supp. at 1431.
53. *Id.*
54. Plaintiffs' 12(n) Statement ¶¶ 32-34.
55. *Id.* ¶¶ 202-03.
56. *Id.* ¶¶ 204-07.
57. *Id.* ¶¶ 204, 206.

her he could do nothing unless Garza volunteered for counseling and did not bother to document her call.[58] On another occasion, Czajkowski reported serious physical abuse to Garza's commanding officer, who called Garza in and suggested that he see a marriage counselor but did not initiate disciplinary proceedings.[59]

Additionally, Garza's superiors showed a marked indifference to his "domestic problems," claiming not only that they did not know of the court order of protection which forbade Garza from any contact with his wife and child but further that the existence of such an order was none of their business.[60] The grossly inadequate OPS investigation concerning the underlying incident and the original finding of "not sustained," which were later condemned in deposition testimony by the head of OPS, the Deputy Superintendent in charge of internal disciplinary investigations, and the plaintiffs' police discipline expert, also buttressed this proof. Furthermore, evidence which showed that Garza continued his abusive conduct towards Czajkowski and her family after the fact and that his supervisors and the department did not counsel or monitor him concerning his continuing pattern of domestic violence also reinforced Czajkowski's failure to discipline evidence.[61]

The second aspect of the plaintiff's *Monell* evidence implicated the department's general practices and attitudes concerning domestic violence by police officers. This evidence came from women who worked in the battered women's network, the director of the OPS, the Deputy Superintendent in charge of internal disciplinary investigations, the Superintendent of Police, and supervisory police personnel, including those who ran the problem employee division.[62] The women who worked in the network established that there was a long standing serious and continuing problem concerning both domestic violence by police officers and the police response to domestic violence in general.[63] Specifically, these women established that the department had a policy of belittling and decriminalizing domestic violence, that they brought the systemic nature of domestic violence, including that in police homes, to the attention of police command personnel, and that they were met with resistance.[64] They further asserted that police wives and girlfriends had more difficulty obtaining police response

58. *Id.* ¶¶ 220-21.
59. *Id.* ¶ 212.
60. Plaintiffs' 12(n) Statement ¶¶ 184, 186, 198, 212.
61. *Id.* ¶¶ 194-95.
62. *Id.* ¶¶ 1-230.
63. *Id.* ¶¶ 1-15.
64. *Id.*

and protection from battering than did other women, that fellow officers and their commanders often pressured battered police wives not to press criminal charges, and that battered police spouses suffered serious physical and emotional abuse which was exacerbated by their well-founded fear of seeking help from their abusers' colleagues in the department.[65]

Much of this evidence was corroborated and expanded upon by former OPS Director David Fogel and Deputy Superintendent Raymond Risley.[66] Fogel testified that nearly ten percent of the excessive force complaints investigated each year by the OPS concerned domestic violence by police officers and further stated that he felt that the department's failure to properly arrest and prosecute police officers who engaged in domestic violence "trivialized" this violence, gave preferred status to officers vis-à-vis civilians, and "thereby condoned, and in some circumstances encouraged this conduct."[67] On at least two occasions, he raised these shortcomings with successive police superintendents and proposed a change in policy, but each time his police proposal was rejected because he could not "break through the police culture."[68] In Fogel's opinion, "the department's response to police domestic violence was inadequate and no police command officer was concerned with the issue of domestic violence or did anything to combat it."[69]

Risley testified that "domestic violence is much more serious in law enforcement" for the reason that "the officer, who is out of control, has enormous power because he has a gun, power of arrest and a wide range of discretionary power."[70] Conversely, he further testified that a police wife is one of the "least protected members of society."[71] While claiming that the department had improved in the area of police domestic violence by the late 1980s, he could offer little in support and admitted that the department's supervisory and disciplinary responses to domestic violence were still inadequate.[72]

Supervisory personnel assigned to monitor and counsel problem employees admitted that they were woefully understaffed, that they did not consider domestic violence to be within their purview because the conduct usually did not happen while the officer was on duty, and

65. *Id.*
66. Plaintiffs' 12(n) Statement ¶¶ 20-31, 40, 102-08, 111-19.
67. *Id.* ¶¶ 23, 26-27.
68. *Id.* ¶¶ 24-25, 29-30.
69. *Id.* ¶ 108.
70. *Id.* ¶ 103.
71. *Id.* ¶ 104.
72. Plaintiffs' 12(n) Statement ¶ 105.

that counseling was voluntary and seldom utilized.[73] However, while it was conceded that domestic violence by police officers was a serious and widespread problem within the department, the testimony, when taken as a whole, established that the department's program of monitoring, counseling, and controlling problem officers systematically failed to either recognize or address domestic violence within the department.

The department's deliberate indifference to these problems was further graphically demonstrated by the testimony of then police Superintendent Martin and several supervisory officers. Martin had publicly minimized serious domestic violence as "misbehaving" by his officers.[74] He claimed that the department had an "excellent monitoring system for domestic violence" and felt that a police wife was more protected than civilian victims.[75] While Martin was aware of the allegedly serious and chronic departmental problems with regard to police domestic violence, as set forth publicly by advocates for battered women and privately by Fogel and Risley, he rejected the validity of these assertions and did nothing to further investigate or remedy them.[76] His supervisory officers, like their superintendent, felt that what officers did at home was their business and that orders of protection against them for domestic violence were not the concern of the department.[77]

The third level of *Monell* evidence developed by the plaintiffs established the inadequacies of the police disciplinary system with regard to excessive force and its relationship to discipline in domestic violence cases. Police statistics showed that the OPS "sustained" only about five to eight percent of the excessive force complaints lodged each year and that the percentage was far lower when the officer was a repeater with numerous excessive force complaints.[78] Both Risley and Fogel conceded in testimony that the OPS should have "sustained" substantially more excessive force cases than it actually did.[79] Police audits in 1987 and 1989 corroborated this and found that many OPS investigations were so inadequate that they gave rise to "[public] perceptions of incompetence and 'a cover-up' by the Department."[80] Additionally, while supposedly staffed by civilians, many OPS investi-

73. *Id.* ¶¶ 184, 186, 218-19.
74. *Id.* ¶ 116.
75. *Id.* ¶¶ 137-38.
76. *Id.* ¶¶ 141-42, 154-55.
77. *Id.* ¶ 140.
78. Plaintiffs' 12(n) Statement ¶¶ 50, 53-54.
79. *Id.* ¶¶ 19-20, 71, 98.
80. *Id.* ¶ 92.

gators were connected to the police, and Fogel admitted that many of his supervisors and investigators were incompetent.[81] Most significantly, in 1987 and again in 1989, Fogel urged the Mayor and the Superintendent to "abolish" or "radically restructure" the OPS because it "immunizes police from internal discipline," "institutionalizes (police) lying, subterfuge and injustice," and "serves the needs of the officer and the [police] union."[82] He proposed an alternative system which he projected would sustain at least three times as many excessive force complaints as the present system.[83] The Superintendent rejected his plan and never acted on the major findings and recommendations of the audits.[84] Since the OPS investigated police domestic violence as well as excessive force cases, Fogel and Risley admitted that the systemic failures to discipline applied equally to both.[85]

CODE OF SILENCE AND EXPERT EVIDENCE

The plaintiffs also developed evidence concerning the code of silence. Fogel testified that the police code of silence "is a conspiracy against the public" which is more often observed by partners, while in police domestic violence cases, the code is implemented to protect the department by minimizing and trivializing the complaint.[86] He elaborated on his memos to the Mayor and Superintendent by stating that the disciplinary system "institutionalizes lying because the officer and his partner always deny the allegations and the repeated 'not sustained' findings make the officer feel immunized from discipline."[87] While Superintendent Martin had previously admitted in public testimony to the existence of a police code of silence, at his deposition he strove to minimize its significance, while conceding that he had done nothing to combat it.[88] By and large, police rank and file and OPS investigators denied knowledge of the code, but one supervisory sergeant candidly revealed that he was blackballed for turning another officer in, that another officer was beaten for breaking the code, and that he advised his officers not to admit to misconduct.[89] Finally, the code of silence was graphically demonstrated by Garza's brazen con-

81. *Id.* ¶¶ 17, 69.
82. *Id.* ¶¶ 68, 72-73.
83. *Id.* ¶¶ 70-71.
84. Plaintiffs' 12(n) Statement ¶¶ 74, 79, 83, 94.
85. *Id.* ¶ 31.
86. *Id.* ¶ 40.
87. *Id.* ¶ 80.
88. *Id.* ¶ 160.
89. *Id.* ¶¶ 190-91.

duct, his subsequent assertions that he was immune from discipline, his partner's unflinching support for his story, and the fact that neither was ever disciplined for making a false statement even after the court's finding of guilt and the department's imposition of discipline.[90]

Finally, plaintiff's police expert, Lou Reiter, examined much of the voluminous policy and practice evidence in the case and testified to several opinions, including: (1) that the department had a policy, practice, and custom of failing to supervise, discipline, and counsel officers who use excessive force; (2) that the department had a code of silence which was "very institutionalized" and which the department, including Martin and Fogel, "failed to address in a reasonable manner;" (3) that the department had "inadequate officer control in the area of domestic violence" and that their discipline for domestic violence was also inadequate; and (4) that their customs and practices regarding discipline, control, and counseling encourage domestic violence.[91] Additionally, he concluded that these policies and practices caused: (1) Garza to batter Czajkowski because he "felt comfortable that he would not be held accountable, and if investigated, the allegations would end up being not sustained;" (2) that Garza's partner should have intervened to stop Garza's illegal actions; and (3) that his partner's subsequent conduct was "typical" of the code of silence.[92]

SUMMARY JUDGMENT DECISION

After the close of discovery, the City of Chicago, Police Superintendent Martin, and OPS Director Fogel moved for summary judgment on the plaintiffs' *Monell* claims.[93] Relying on the evidence presented by plaintiffs, the court denied the City's motions, finding that:

> Plaintiffs have presented evidence from which it could be found that the Department's disciplinary procedures, as implemented through O.P.S., had been woefully inadequate and had sustained only a fraction of meritorious cases of excessive force and domestic violence. That such improper conduct was unlikely to result in disciplinary conduct was known throughout the Department, including by the Department Superintendent and the Director of O.P.S. It was also known in the Department that there was a serious problem of domestic violence against wives of police officers. Plaintiffs present sufficient evidence from which a jury could find that police officers would have understood that excessive force and domestic violence would not necessarily be punished. Plaintiffs also present sufficient

90. Plaintiffs' 12(n) Statement ¶¶ 47-48.
91. *Id.* ¶¶ 172-73, 175-76.
92. *Id.* ¶ 177.
93. Czajkowski v. City of Chicago, 810 F. Supp. 1428, 1431 (N.D. Ill. 1992).

> evidence from which it could be found that a code of silence existed within the Department.[94]

The court further found that the evidence was also sufficient to support a finding of deliberate indifference and that the jury could reasonably find a causal link between these practices and the defendants' unconstitutional conduct:

> Garza would have known that he was unlikely to be punished and that he therefore was more free to commit the conduct alleged by plaintiffs. It could also be found that these customs contributed to Hrebanek's failure to intervene during the June 1988 incident. Additionally, Czajkowski reported Garza's prior abusive conduct to various members of the Department prior to the June 1988 incident. It could be found that the failure to take further action in response to these reports was the result of the custom of not disciplining officers who commit domestic violence and that failure of the Department to take further action in response to Czajkowski's complaints contributed to plaintiffs' injuries.[95]

Finally, the Court denied Martin and Fogel's motion:

> [T]here is evidence to support the existence of Department practices of failing to discipline and a code of silence, as well as Superintendent Martin's and Director Fogel's knowledge of those practices. There is sufficient evidence from which Martin and Fogel's personal responsibility and deliberate indifference can be inferred. Also, these defendants are not entitled to qualified immunity. It was clearly established prior to 1988 that liability for individual officer's acts of excessive force could be based on a custom or practice of failing to discipline. It was also clearly established that responsible supervisors could be individually liable for deliberate indifference to systemic deficiencies.[96]

The case was set for trial and the judge convened a series of pretrial conferences. During these conferences, the court made preliminary rulings on documents and witnesses. While narrowing plaintiffs' policy and practice proof somewhat to focus more on the domestic violence aspect of the claim, the court made it clear that he would give plaintiffs' police expert broad latitude under Rule 703 of the Federal Rules of Evidence[97] to testify about a wide range of policy evidence which it did not deem to be otherwise admissible. On the eve of trial, the case was settled. Subsequently, the City made some positive changes in its policies and practices with regard to combating domestic violence by police officers.

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94. *Id.* at 1439-40.

95. *Id.* at 1440.

96. *Id.* at 1441 (citations omitted).

97. FED. R. EVID. 703.

CONCLUSION

Monell claims serve an important role in police misconduct cases. Beyond the strategic and tactical benefits which are discussed above, a judiciously employed policy and practice claim serves to enable a private practitioner to discharge his obligation as a "private attorney general" under § 1983[98] by more effectively deterring police abuse, positively affecting police policies and practices, and educating the public about police misconduct. So long as there continues to be a de facto prohibition against injunctive relief in police abuse cases[99] and state and local agencies fail to adequately prosecute or obtain systemic relief for police abuse, *Monell* claims by private litigators will continue to serve an important public interest and should be utilized in appropriate police misconduct cases.

98. 42 U.S.C. § 1983 (1994).

99. *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983).